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IN THE
COURT OF APPEALS OF INDIANA

KENNY COURTS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0705-CR-271
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G01-0609-FB-171406

December 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kenny Courts appeals his convictions and sentence for Class B felony criminal confinement and Class C felony battery. We affirm in part, reverse in part, and remand.

Issues

Courts raises three issues, which we reorder and we restate as:

I. whether his convictions violate double jeopardy;

II. whether there is sufficient evidence to support his confinement conviction and

III. whether his sentence is appropriate.

Facts

In August 2006, Courts and his wife, P.C., were involved in argument about Courts's daughter. P.C. turned to the exit the room, Courts grabbed P.C.'s shirt from behind, and she was "snatched back." Tr. p. 24. When Courts grabbed P.C. she fell and landed on her right leg. P.C. tried to get up but could not because Courts was forcing her down. P.C. was trying to get off her foot because she could feel pressure in her "whole entire leg." Tr. p. 27. P.C. felt her leg break and experienced excruciating pain through her foot, ankle, and knee. When she felt it break she started screaming. Courts's stopped pushing her down but continued to hold her shirt. As P.C. was crawling toward the hallway, Courts's daughter exited her bedroom.

That night Courts and his daughter took P.C. to the hospital where she was diagnosed with a right ankle fracture and cracked shin bone. Her injury was severe and required surgery.

On September 11, 2006, the State charged Courts with Class B felony aggravated battery, Class B felony criminal confinement, and Class C felony battery. After a bench trial, Courts was convicted of Class B felony criminal confinement and Class C felony battery. At the sentencing hearing, the trial court concluded that the aggravating and mitigating circumstances were in balance. For the confinement conviction, Courts was sentenced to ten years with four years suspended. For the battery conviction, the trial court sentenced him to four years executed and ordered that sentence to be served concurrent with the confinement sentence. Courts now appeals.

Analysis

I. Double Jeopardy

Courts argues that the Indiana Constitution's Double Jeopardy Clause prohibits convictions for both Class C felony battery and Class B felony confinement. That Clause, found in Article 1, Section 14 of the Indiana Constitution, "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Courts argues that his convictions violate the actual evidence test set forth in Richardson. Id. at 53 ("To show that two challenged offenses constitute the 'same offense' in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have

been used to establish the essential elements of a second challenged offense."). As our supreme court has more recently stated:

> the actual evidence test explicitly requires evaluation of whether the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. The test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. In other words, under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). To determine what facts were used, we consider the evidence, charging information, final jury instructions (if there was a jury), and arguments of counsel. Goldsberry v. State, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

After reviewing the evidence, charging information, and arguments of counsel we conclude there is a reasonable possibility that the same facts were used to establish both the battery and the confinement. The charging information alleged that Court knowingly confined P.C. without her consent and that such confinement resulted in "fracture(s) and/or torn ligament(s) and/or extreme pain."[1] App. p. 17. Regarding the battery, the State alleged that Court knowingly touched P.C. in a rude, insolent, or angry manner and

[1] To convict Courts of Class B felony confinement, the State was required to show that he knowingly or intentionally confined P.C. without her consent and caused her serious bodily injury. See I.C. § 35-42-3-3(b)(2).

that the touching resulted in serious bodily injury to P.C., specifically "fracture(s) and/or torn ligament(s) and/or extreme pain."[2] App. p. 18.

During the opening argument at trial, the State asserted:

> [P.C.] will testify that when she turned to leave the room, the defendant grabbed her by the shirt from behind, pulled her to the ground and after being pulled to the ground was then pressed on the floor despite her pleas from [sic] requesting to be let up. The defendant continued to press on her causing her knee to break, her ankle to break severely, and the victim will testify that she was in extreme pain.

Tr. p. 7.

This is consistent with P.C.'s testimony in which she explained that while Courts was pushing on her she was trying to get off her foot because she could feel pressure in her whole leg. When asked how that felt, she explained, "It broke. It crushed, and it felt like excruciating pain. It went all through my foot, my ankle, my knee." Tr. p. 28. When asked how long Courts held her down, P.C. answered, "I'm not sure, a minute, minutes and seconds, but I do know that when I felt it break, and I heard it break, I start [sic] screaming, and the scream is what made him let go from the pressure . . . ." Id.

In its closing argument the State asserted:

> she was grabbed from behind, thrown to the floor, then held on the floor, and confined, which ultimately lead to the injuries that she received, that support [sic] the aggravated battery . . . . Further, she testified that this defendant, despite being asked and pleading, she said, to be let up, the defendant didn't do so. Ultimately, the defendant did let her up, she

[2] To convict Courts of Class C felony battery, the State was required to show that Courts knowingly or intentionally touched another person in a rude, insolent, or angry manner that results in serious bodily injury to any other person. See Ind. Code § 35-42-2-1(a)(3).

> testified that he was, that his demeanor was angry. The defendant himself has testified that he was furious, in his own words. The defendant, in his own words, also said that he has high blood pressure, and he was afraid of reaching his quote, boiling point. The defendant testified that he jumped up, that he put his hands on the victim's shoulders. He has testified incredulously, Your Honor, that he was holding her on the floor with a broken ankle and a broken knee to keep her from throwing things. That just doesn't even make sense, Your Honor. He, in his own words, said that he quote, restrained her. So clearly [the confinement count] has been satisfied by the defendant's own admissions. . . .

Tr. pp. 88-89.

On appeal, the State admits it is "somewhat difficult" to separate which injury was caused by the confinement and which was caused by the battery. Appellee's Br. p. 8. It asserts, however, that P.C.'s pain was worse when she was confined and claims, "the trier of fact could have concluded that the fractures and some pain occurred as a result of the battery and more pain occurred when the Defendant confined [P.C.]" Id.

In determining whether there is a double jeopardy violation, the proper inquiry is not whether there is a reasonable probability that the trier of fact used different facts, but whether it is reasonably possible it used the same facts to convict the defendant of both charges.[3] Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007). Here, the charging information, arguments of counsel, and evidence do not clearly set forth two separate instances of criminal conduct. Instead, this is a single act in which Court's grabbed

[3] Our focus is not on whether the serious bodily injury that P.C. clearly suffered was improperly used to enhance both offenses as a matter of common law double jeopardy jurisprudence, but whether a constitutional violation occurred when Courts was convicted of both offenses. See Strong v. State, 870 N.E.2d 442, 443 (Ind. 2007) (referring to "rules of statutory construction and common law that constitute one aspect of Indiana's double jeopardy jurisprudence" where a conviction is elevated based on the same bodily injury that forms the basis of another conviction).

P.C.'s shirt and held her to ground, causing her leg to break. We conclude there was a reasonable probability that the State proceeded twice against Courts for the same criminal transgression because the same conduct—Courts grabbing P.C.'s shirt and holding her on the ground—established the elements of the Class C felony battery and the Class B felony confinement. See Stafford v. State, 736 N.E.2d 326, 331 (Ind. Ct. App. 2000) (holding that Stafford was subjected to double jeopardy because the elements of Class B felony confinement and Class C felony battery both were satisfied by placing a rope around the victim's neck), trans. denied.

"When two convictions contravene double jeopardy principles, we may vacate one of the convictions or 'we may remedy the violation by reducing either conviction to a less serious form of the offense if doing so will eliminate the violation.'" Bradley, 867 N.E.2d at 1285 (citation omitted). We vacate Courts's Class C felony battery conviction.

II. Sufficiency of the Evidence

Courts argues that there is insufficient evidence to support his confinement conviction. Upon a challenge to the sufficiency of evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We respect the trier of fact's exclusive province to weigh conflicting evidence and must consider only the probative evidence and reasonable inferences supporting the conviction. Id. Expressed another way, we must affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

To sustain the Class B felony confinement conviction, the State was required to prove that Courts knowingly or intentionally confined P.C. without her consent and caused her serious bodily injury. See I.C. § 35-42-3-3(b)(2). In arguing that there is insufficient evidence of confinement, Courts compares his testimony to P.C.'s and asserts that his daughter's testimony corroborates his testimony. His argument is a request for us to reweigh the evidence. We must decline this request.

P.C. testified, "I turned to walk out of the room, and I was grabbed from behind, and I was snatched back." Tr. p. 24. She stated, "He grabbed me, and I fell." Tr. p. 25. She went on to testify, "After I fell back, I was trying to get up, and I couldn't because he was forcing me down. He was pressing down on me, and I was trying to get off my leg, and I was telling him to let go, it hurts, my leg, my leg. . . ." Tr. p. 26. During the incident P.C.'s ankle was fractured and her shinbone was cracked. This evidence was sufficient to show that Courts criminally confined P.C.

III. Sentence

Courts also argues that his sentence is inappropriate. Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the

merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Courts does not challenge the propriety of the aggravating and mitigating circumstances considered by the trial court; he only argues that his ten year sentence is inappropriate under Indiana Appellate Rule 7(B).

In assessing the nature of the offense, it is important to note that during an argument with his wife, Courts used the weight of his body in such a manner that it caused P.C.'s right ankle to fracture and her shin bone to crack. P.C. had to undergo surgery to repair the injuries, causing her to miss work for five months.

As to Courts's character, his criminal history includes a misdemeanor conviction in California in 1979, a felony conviction for lewd or lascivious acts with a child under fourteen in 1981 in California, a Class A misdemeanor battery conviction in 1990 in Indiana, and a Class A misdemeanor for operating a motor vehicle while intoxicated in 1991 in Indiana. Because Courts's criminal history is either relatively minor or remote in time, we conclude it warrants only slight aggravating weight. We also acknowledge that he has raised his daughter, and she continued to live with him while she attended college. Further, Courts has a steady employment history and a military background. With these factors in mind, we conclude that his sentence of six years executed and four suspended, totaling ten years, is appropriate for the Class B felony conviction.

Conclusion

Although there is sufficient evidence to support the battery and confinement convictions, Courts's convictions violate double jeopardy. Accordingly, we vacate his

battery conviction. Courts's sentence is appropriate. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and ROBB, J., concur.